he could do so without seeking the forbidden assistance of the trustee.[11]

An application of the foregoing principles seems to have been necessary to determine the priority of rights between the parties in the recent case of the *First Nat. Bank of Auburn* v. *The Eastern Trust & Banking Co.* (Me. 1911) 79 Atl. 4. A company deposited money, which it held in trust for the plaintiff bank, in its individual deposit account with the defendant bank, giving no notice of the trust relation. Subsequently, after notice and demand, the defendant refused to satisfy the plaintiff's claim, but later applied the money in payment of notes on which the depositor company was indebted to the defendant, and which were overdue at the time of the deposit of the trust fund. The plaintiff successfully relied on the artificial rule of law permitting a *cestui que trust* to follow trust funds even when so mingled by deposit to the trustee's personal account that their identity is lost.[12] The court, however, failed to consider the nature and effect of the banker's lien, which attaches upon the account of any depositor who is at the same time indebted to a bank,[13] and which therefore in the case under consideration came into existence in favor of the defendant before notice of the plaintiff's claim. Obviously such a lien upon securities deposited in a bank must be in the nature of a pledge giving not only a right in equity and the right of possession, but also power to appropriate in payment of the debt,[14] and it has been intimated that this doctrine is equally applicable to a deposit of funds, such as that in the principal case.[15] Since, however, in such circumstances the lien attaches to a mere account, which is simply a debt of the bank to the depositor, it clearly follows that it operates in effect as a set-off to any claim by the depositor against the bank.[16] In either view of the nature of the lien, however, since the right is complete in itself and may be exercised by the appropriation of the funds without the assistance of the trustee, it is apparent that it would be inequitable to prevent the defendant, even after notice, from making such an appropriation.

CLASSIFICATION OF EXTRAORDINARY DIVIDENDS AS CAPITAL OR INCOME.—When corporate stock is devised in trust to pay the income to one for life, with remainder over of the shares themselves to another, the courts of different jurisdictions, all professing the single purpose of effectuating the wishes of the testator as declared in the will, have reached irreconcilable conclusions as to the merits of the respective claims of the life tenant and remainderman to extraordinary or bonus

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[11]Dodds *v.* Hills (1865) 2 Hem. & M. 424; see also Roots *v.* Williamson (1888) L. R. 38 Ch. Div. 485.

[12]9 COLUMBIA LAW REVIEW 716; *In re* Mulligan (1902) 116 Fed. 715; *In re* Hallett's Estate (1879) L. R. 15 Ch. Div. 696, 709.

[13]Nat. Bank *v.* Insurance Co. (1881) 104 U. S. 54; Mt. Sterling Nat. Bank *v.* Green (1896) 99 Ky. 262.

[14]1 Morse, Banks & Banking (3rd ed.) Ch. XXII; see Reynes *v.* Dumont (1889) 130 U. S. 354.

[15]1 Morse, Banks & Banking (3rd ed.) Ch. XXII.

[16]School District in Greenfield *v.* First Nat. Bank (1869) 102 Mass. 174; but see Appeal of the Liggett Spring & Axle Co. (1885) 111 Pa. St. 291.

dividends. While all jurisdictions agree in discarding[1] the early English doctrine that such dividends were in every instance presumed to be capital and were added to the *corpus* of the estate without further query,[2] the cases have failed to unite on any one solution of this ever recurring problem; and where the question is one of first impression the court finds itself confronted by at least three divergent lines of authorities. A consideration of the difficulty of tracing a declared dividend back to its source[3] through the intricacies of the corporate history,[4] and of the advisability of avoiding nice distinctions[5] and of adhering to some simple rule,[6] has given rise to a doctrine of mere expediency[7] followed in England,[8] the Supreme Court of the United States,[9] Massachusetts,[10] and some of the other States,[11] and exemplified in the recent cases of *Newport Trust Co.* v. *Van Rensselaer* (R. I. 1911) 78 Atl. 1009 and *Jackson* v. *Maddox* (Ga. 1911) 70 S. E. 865, the first of which decided that because a dividend is cash it is to be treated as income, the latter that a dividend of stock goes *ipso facto* to the remainderman. It should be noted, however, that a strict interpretation of this rule is seldom adopted, and the courts regard the substance rather than the form of the dividend as determinative of its disposition.[12] Thus if a corporation distributes its own stock which it has either purchased from former holders or received in satisfaction of a debt, the transaction is held to result no more in a stock dividend than if the payment had been in cash or in any other form of corporate assets;[13] while a dividend in effect of stock will not through the mere form of a cash distribution be lost to the *corpus* of the trust estate.[14] This doctrine, however, is admittedly open to criticism on the ground that it makes the rights of third parties as between themselves depend upon an arbitrary act of the corporation,[15] and it has therefore been rejected in a number of jurisdictions.

The theory that no heed should be given to the form of the dividends furnishes a common point of departure for two further doctrines which nevertheless ultimately reach widely different results. The

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[1]See Oliver's Estate (1890) 136 Pa. St. 43.

[2]Paris *v.* Paris (1804) 10 Ves. Jr. *185.

[3]See Bouch *v.* Sproule (1887) L. R. 12 App. Cas. 385, 398; *in re* Malam L. R. [1894] 3 Ch. 578.

[4]Smith *v.* Dana (1905) 77 Conn. 543; Minot *v.* Paine (1868) 99 Mass. 101.

[5]Oliver's Estate *supra.*

[6]D'Ooge *v.* Leeds (1900) 176 Mass. 558; Bulkeley *v.* Worthington Ecclesiastical Society (1906) 78 Conn. 526.

[7]Smith *v.* Dana *supra.*

[8]See note 3.

[9]Gibbons *v.* Mahon (1890) 136 U. S. 549.

[10]Minot *v.* Paine *supra;* Davis *v.* Jackson (1890) 152 Mass. 58. This is known as the Massachusetts rule.

[11]De Koven *v.* Alsop (1903) 205 Ill. 309; Waterman *v.* Alden (1890) 42 Ill. App. 295; Millen *v.* Guerrard (1881) 67 Ga. 284.

[12]Leland *v.* Hayden (1869) 102 Mass. 542.

[13]Green *v.* Bissell (1907) 79 Conn. 547.

[14]Rand *v.* Hubbell (1874) 115 Mass. 461.

[15]Pritchitt *v.* Nashville Trust Co. (1896) 96 Tenn. 472; Carter *v.* Crehore (1900) 12 Hawaii 309.

courts of Pennsylvania,[16] on the one hand, base their decisions on the reasoning that since all corporate profits accumulated before the testator's death must have been considered by him as a part of his property, they must belong to the body of the trust which he bequeaths, while all the profits subsequently earned must have been meant by him to go to the life tenant as income.[17] Accordingly dividends declared after the creation of the trust are to be apportioned between the remainderman and life tenant with a view to the period during which they or the profits they represent were earned.[18] This doctrine is open to the seemingly fatal objection of inconsistency with the well established principle that a stockholder as such has absolutely no right to nor interest in the assets of his corporation until the actual declaration of the dividend.[19] The New York courts, however, have escaped this difficulty by awarding the dividend to the person entitled to it at the time of its declaration,[20] and, in the rule that the source from which the dividend springs shall determine who is so entitled,[21] have reached a conclusion which seems to be more satisfactory than the doctrines hitherto considered. Thus dividends issuing from the profits of the corporation, in whatever form declared or whenever earned, go to the life tenant,[22] while those representing the actual increase of capital belong to the *corpus* of the estate and are held for the remainderman.[23] This principle, though affording no such clear and easy guide for the trustee as that furnished by the Massachusetts rule,[24] nevertheless avoids the unfortunate result of sacrificing the purposes of the testator for the sake of mere expediency. It is difficult indeed to discover between a dividend which is paid in cash and one which is paid in stock, when both are based upon a division of earnings,[25] any substantial distinction which would stamp the one as income, and the other as capital. In pursuance therefore of the testator's intention that the former should belong to the life estate and the latter to the remainderman, the problem seems to resolve itself simply into a question whether the dividend consists merely in a redivision of the capital of the corporation, or in a distribution of its earnings. The former must continue capital, while the latter can be only income.

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[16]This is also inadvisedly called the American rule. See Carter *v.* Crehore *supra.*

[17]Earp's Appeal (1857) 28 Pa. St. 368; Smith's Estate (1891) 140 Pa. St. 344, 352; Holbrook *v.* Holbrook (1907) 74 N. H. 201.

[18]Instead of dividing the dividend according to the profits on hand at the time of the testator's death, the Maryland courts take the date of the last semi-annual dividend as the dividing point. Thomas *v.* Gregg (1894) 78 Md. 545.

[19]Matter of Kernochan (1887) 104 N. Y. 618, 623, 627.

[20]Matter of Kernochan *supra;* see also Mann *v.* Anderson (1899) 106 Ga. 818.

[21]McLouth *v.* Hunt (1897) 154 N. Y. 179; Lowry *v.* Farmers' Loan & Trust Co. (1902) 172 N. Y. 137, 143; Robertson *v.* De Brulatour (1907) 188 N. Y. 301; *contra,* Chester *v.* Buffalo Mfg. Co. (N. Y. 1902) 70 App. Div. 443, one justice dissenting.

[22]Lowry *v.* Farmers' Loan & Trust Co. *supra;* Hite *v.* Hite (1892) 93 Ky. 257.

[23]Holbrook *v.* Holbrook *supra.*

[24]Minot *v.* Paine *supra.*

[25]Lowry *v.* Farmers' Loan & Trust Co. *supra.*